

## JUDICIALIZING FEDERATIVE POWER

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The views expressed herein are my own, and do not necessarily reflect the views or policies of the Justice Department, the White House, or any other governmental entity.

## I. INTRODUCTION

The intellectual origins of federative power account for the beguiling nature of, and approach to, that subject in American constitutional law and history. Federative power is Locke's description of the state's authority concerning "war and peace, leagues and alliances," or external affairs.<sup>1</sup> Locke identified federative power alongside executive power and legislative power, but placed federative power wholly in the hands of the executive, or a single magistrate who would possess the executive power (which was distinct in Locke's formulation).<sup>2</sup> He plainly understood the necessities that marked the vicissitudes of foreign affairs, explaining that matters of war and peace could not be directed by "antecedent, standing, positive laws" and must be dealt with through the exercise of prudence and wise judgment.<sup>3</sup> Despite Locke's influence in the founding generation,<sup>4</sup> it is notable that the Constitution does not adopt his taxonomy. Rather, the Constitution's allocation of power more closely resembles that of Montesquieu, whose understanding of separated and divided powers serves as the fundamental structure for our constitutional scheme.<sup>5</sup> In this sense, it can be said that we have a kind of intellectually Lockean constitution that is moderated (and much improved) by Montesquieu's formal separation of powers.

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1. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 76 (C. B. Macpherson, ed. Hackett Publ'n Co. 1980) (1690).

2. *Id.* at 76–77.

3. *Id.* at 77; see also ROGER M. BARRUS ET AL., *THE DECONSTITUTIONALIZATION OF AMERICA* 128–29 (2004) (explaining Locke and stating that "[s]ince the executive is always in being and exercises the force of the community as part of its domestic duties, it is better positioned than the legislature to exercise the federative power.").

4. See, e.g., HARVEY C. MANSFIELD, *TAMING THE PRINCE* 258 (1993) (stating Locke's influence on the American Constitution); FORREST McDONALD, *NOVUS ORDO SECLORUM* 7 (1985) (noting that Locke's political theory was repeated by the Framers); JACK N. RAKOVE, *ORIGINAL MEANINGS* 7 (1996) (noting the influence of Locke and other Enlightenment philosophers upon the making of the Constitution); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 8 (1973) ("[T]he Founding Fathers were more influenced by Locke than any other political philosopher.").

5. See MANSFIELD, *supra* note 4, at 290 (explaining Montesquieu's influence on the American Constitution); McDONALD, *supra* note 4, at 81–84 (same).

Montesquieu identifies the executive and legislative powers, but adds a third distinct power, the power of judging.<sup>6</sup> The federative power, however, disappears as a distinct power in Montesquieu, for he joins domestic and foreign affairs powers in the unity of an executive and gives independence to the judicial power (which he constitutes with juries of the defendant's peers; Locke acknowledged the judicial power but placed judicial power in the legislature).<sup>7</sup> In Book XI of *The Spirit of the Laws*, when he introduces the judicial power, Montesquieu says that liberty in a citizen is "that tranquility of spirit which comes from the opinion each one has of his security."<sup>8</sup> Perhaps, then, it is no accident that federative power is not expressly and distinctly revealed in Montesquieu's allocation of powers. As Roger Barrus has suggested, perhaps Montesquieu sensed something dangerous about federative power (at least as Locke had described it) and thus needed to obscure that power in order to give citizens a greater sense of security about their freedom.<sup>9</sup>

In light of these different approaches by two thinkers of significant repute and distinction among the Framers, it is important to ask whether the federal Constitution is intentionally ambiguous about federative power. And when we talk about federative power and the Constitution, it stands to reason that our focus is predominantly upon the distribution of that power among the political branches of our government. The Framers explicitly rejected Locke's formal allocation of federative power by, instead, distributing powers of war and foreign affairs in both the Congress *and* the President: the President serves as Commander-in-Chief,<sup>10</sup> has the power to make treaties, and can appoint ambassadors, ministers, consuls, and other officers to assist him in carrying out foreign policy;<sup>11</sup> Congress has the power to declare war, grant letters of marque

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6. See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Anne E. Cohler et al., trans., Cambridge Univ. Press, 1989) (1748) (distinguishing the legislative and executive powers from judicial powers).

7. *Id.*; LOCKE, *supra* note 1, at 69–77.

8. MONTESQUIEU, *supra* note 6, at 157.

9. Roger M. Barrus, Remarks at American Political Science Association Annual Meeting, Panel on "Federative Power and the Constitution" (Sept. 2, 2006) (on file with author); see also BARRUS ET AL., *supra* note 3, at 128 (stating that the Framers "hid Locke's advice in complexity").

10. U.S. CONST. art. II, § 2, cl. 1.

11. *Id.* art. II, § 2, cl. 2.

and reprisal, make rules for the armed forces,<sup>12</sup> and provide funding for the military and military operations.<sup>13</sup>

Though the Constitution's formal division of power appears to be more Montesquieuan than Lockean, and though the federative power (while less obscure than with Montesquieu) remains at least ambiguous, the Framers did not entirely agree upon the scope of the powers over war and peace that had been assigned to the two political branches. In addition, there was some sympathy for at least the theoretical basis for Locke's federative regime. Publius, after explaining in *The Federalist No. 70* that energy in the executive is essential to good government,<sup>14</sup> reminds us in *The Federalist No. 74* that the Commander-in-Chief power should obviously belong to the Executive because "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."<sup>15</sup> In the same paragraph, Publius also explains that evidence of the general acceptance of this notion comes from the state constitutions<sup>16</sup>—he is right. During the Revolutionary period, virtually all of the state constitutions placed war-making authority in executive hands,

12. *Id.* art. II, § 8, cl. 11.

13. *Id.* art. II, § 8, cl. 12. My purpose here is not to take a position on which theory of constitutional power is preferable as a normative matter—the so-called pro-Congress view or the so-called pro-Executive view. The literature on this subject is vast and excellent. See, e.g., BARRUS ET AL., *supra* note 3, at 130; LOUIS FISHER, PRESIDENTIAL WAR POWER 1–16 (2d ed., rev. 2004); JOHN HART ELY, WAR AND RESPONSIBILITY 3–5 (1993); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 67–72 (1990); Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 693, 695 (1990); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 553–559 (2004); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 108–112 (1984); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 237–243 (2001); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1548–53 (2002); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 105–110 (1991); Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 904–906 (1994); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 176–182 (1996) [hereinafter Yoo, *Politics by Other Means*]; John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1639–43 (2002). I confess I am persuaded by Professor John Yoo's recent work on this subject, *The Powers of War and Peace*, in which he (properly, I think) describes the Constitution's vision of a federative power centralized in an energetic executive, checked by a Congress with distinct powers of funding, declaration, and general legislation. JOHN YOO, THE POWERS OF WAR AND PEACE 88–142 (2005). That agreement is reflected elsewhere in this article.

14. THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

15. THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 14, at 422.

16. *Id.*

while giving their legislatures control over the state treasuries; only South Carolina's Constitution placed war-making authority in the legislative branch.<sup>17</sup> And even though the Constitution grants Congress the power to "declare war," the Constitutional Convention, like the antecedent state constitutions, distinguished "declaring war" from "making war."<sup>18</sup> As John Yoo explains, the primary authorities on war and treaties at the time of the Framing—Grotius, Vattel, and even Blackstone—did not contend that declarations of war were necessary to initiate hostilities; such declarations, rather, served as legal notice to the enemy and to the citizenry that a state of war existed.<sup>19</sup>

Later, the dispute over who holds primacy in exercising federative power was best captured in Hamilton and Madison's Helevidius/Pacificus debate concerning President Washington's proclamation of neutrality in the war between England and France. Pacificus, Hamilton's pseudonym, comes closest to the Lockean vision of an executive magistrate holding the federative power.<sup>20</sup> In foreign relations, Pacificus contends, the executive's power is best capable of responding to the necessities of international intercourse and, moreover, it is whole—as Harvey Mansfield explains, "it acts for a whole in relation to other wholes";<sup>21</sup> while the Constitution admits of exceptions, those exceptions are (and must be construed as) narrow.<sup>22</sup> Pacificus wants to ensure the preservation of the executive's constitutional prerogatives—among those is to preserve the Union—and that each branch is capable of performing its particular functions.<sup>23</sup> The debate is notable not merely for its content, but also for Hamilton's singular place in the Founding Era and his influence in the development of presidential power. As Karl Walling explains, "Hamilton was both a constitutionalist and the most

17. See YOO, *THE POWERS OF WAR AND PEACE*, *supra* note 13, at 72 (requiring legislative approval of war).

18. See 2 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 318–19 (Max Farrand ed., 1966) (reporting the debate over war powers).

19. See YOO, *THE POWERS OF WAR AND PEACE*, *supra* note 13, at 33 (explaining Grotius and Vattel's positions on declarations of war).

20. Cf. LOCKE, *supra* note 1, at 77 ("These two powers, *executive* and *federative*, though they be really distinct in themselves . . . are almost always united. . . . [Federative power] is much less capable to be directed by antecedent, standing, positive laws, than the *executive* . . .").

21. MANSFIELD, *supra* note 4, at 276.

22. Alexander Hamilton, *The First Letter of Pacificus*, in *THE POWER OF THE PRESIDENCY* 53–58 (Robert S. Hirschfield ed., 3d ed. 1982).

23. *Id.* at 54–56.

important Founder of the modern presidency.”<sup>24</sup> Thus, if we want to understand the origins and development of the American presidency, we must understand Hamilton (who was the voice and rhetorical defender of the Washington Administration), and Hamilton’s *Pacificus* offers a quintessentially robust perspective on the executive’s federative powers in the American constitutional scheme, attributing a Lockean meaning to presidential foreign affairs power.<sup>25</sup> One senses that as *Pacificus*, Hamilton’s conception of the federative power seeks to embrace the structural and institutional design of Article II while retaining a kind of Machiavellian authority to meet necessity.<sup>26</sup> In this sense, perhaps Hamilton embraces a larger purpose of the Constitution, to unite stability and adaptability.

Consequently, Locke’s vision of a single magistrate with authority to direct foreign relations through acts of prudence that were not amenable to the precise directives of positive law, finds expression in American constitutional history, theory, and practice, even if not in its purest form. In this sense, we have both an un-Lockean Constitution of federative power—one in which federative power is divided between the legislature and

24. KARL-FRIEDRICH WALLING, *REPUBLICAN EMPIRE: ALEXANDER HAMILTON ON WAR AND FREE GOVERNMENT* 153 (1999).

25. See *id.* at 146–47 (describing Hamilton’s role in the Washington Administration). For another excellent discussion of Hamilton’s *Pacificus* essays in historical context, see JOHN LAMBERTON HARPER, *AMERICAN MACHIAVELLI: ALEXANDER HAMILTON AND THE ORIGINS OF U.S. FOREIGN POLICY* 120–22 (2004).

Ron Chernow’s excellent biography of Hamilton also provides a brief, but useful, examination of the debate, concluding that *Pacificus* demonstrated Hamilton’s “impassioned pragmatism that informed his foreign-policy views.” RON CHERNOW, *ALEXANDER HAMILTON* 442 (2004). Chernow also rightly demonstrates that Madison’s response as *Helvidius*, one instigated by Jefferson, was largely *ad hominem*, “reflect[ing] . . . deep animosity” and “[i]n prose more pedestrian than Hamilton’s.” *Id.* at 443. Of course, Hamilton had a flair not only for offering persuasive rhetorical defenses of expansive executive power, but also for defending expansive federal powers, more generally. This is evident in his defense of a national bank. See *id.* at 353–54 (explaining Hamilton’s defense of implied powers). Many of Hamilton’s arguments for the bank, which he viewed as crucial to his early economic and fiscal programs, were echoed by Daniel Webster when Webster argued *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in the Supreme Court. Chernow, *supra* at 355. Chief Justice Marshall’s opinion in *McCulloch* reads, in many respects, like a Hamiltonian vision of federal power. See *McCulloch*, 17 U.S. (4 Wheat.) at 316 (holding that Maryland does not have the power to tax the Second Bank of the United States).

26. See, e.g., NICCOLO MACHIAVELLI, *THE PRINCE* 61 (Daniel Donno ed. & trans., Bantam Dell 2003) (1513) (explaining that, in conducting military matters, “Every wise prince should pursue habits similar to these and never submit to idleness in time of peace, but rather endeavor to turn such time to advantage so as to profit from it in adversity. Thus, when fortune turns against him, he will be prepared to resist it.”).

executive, contemplating that they will share responsibility and exercise sometimes competing prerogatives in war and foreign affairs—and a less noticeable Lockean executive, who, though obscured by the complexities of the un-Lockean scheme, will act with energy (and the ingredients that characterize it) to grapple with necessity and to defend affirmatively the Constitution and the Republic. The Lockean traits of the executive are formal, then, but nuanced.

This background is relevant because it provides the context for what may seem an unremarkable proposition: in viewing the allocation of federative power in the Constitution, whether we agree as a normative matter with the distribution that the Constitution contains, overwhelming focus of the academic literature is upon the Congress and the President; it is clear that one branch is largely left out of the dialogue—the Judiciary. Article III establishes an independent Judiciary with, as Publius described it, neither the power of the sword nor the purse.<sup>27</sup> Yet as unremarkable as this proposition may be, it, too, possesses a degree of nuance and complexity when we consider the appropriate role for the courts in a democratic republic. And just as it has done in a variety of areas of domestic policy, the Judiciary is now poised to exert tremendous influence over American foreign policy and wartime decisionmaking.

I have written elsewhere of the historical treatment of war powers cases in the American courts before September 11, 2001.<sup>28</sup> But a new evaluation is warranted. This paper is therefore a reaction and response to two distinct critiques: first, the more general theoretical assertion of several prominent legal scholars like John Ely, Louis Henkin, Harold Koh, and Thomas Franck, who have argued that courts should be more involved in assessing the actions of politicians (particularly the President) with regard to federative powers<sup>29</sup> (Professor Franck

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27. See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 14, at 437.

28. See generally J. Richard Broughton, *What Is It Good For? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685 (2001) (reviewing pre-9/11 war powers cases).

29. See ELY, *supra* note 13, at 54–60; THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS 8–9 (1992); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990); KOH, *supra* note 13, at 134–49; see also Major Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180 (1998) (contending that history establishes an ongoing role for courts in resolving war powers disputes); FISHER, *supra* note 13, at 197–99 (urging lawmakers not to try to compel court action).

has been most forceful, arguing that the rule of law requires courts to actively conduct judicial review of foreign affairs cases, recognizing no *judicial* difference between foreign and domestic affairs);<sup>30</sup> and second, the more specific contemporary argument that because, through a variety of foreign policy decisions, President Bush has asserted an unprecedented vision for executive authority, the White House's existing legal position compels judicial review as a crucial check on the Presidency.<sup>31</sup> This paper contends that an increasingly judicialized federative power is an unwelcome step toward dismantling the important distinction between domestic affairs and foreign affairs, the latter being marked by a harsh form of necessity that requires unique criteria for political action. Moreover, I argue, judicializing federative power marginalizes political institutions and the formal constitutional arrangements that characterize their roles in foreign affairs.<sup>32</sup>

## II. WAR POWERS AND JUDICIAL REVIEW, A BRIEF BUT (IMPERFECTLY) ORGANIZED HISTORY

While it is true that the judicial power extends to cases involving American laws and treaties, and affecting ambassadors

30. See FRANCK, *supra* note 29, at 156–59; but see Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980 (1993) (questioning Professor Franck's failure to distinguish foreign and domestic affairs for judicial review purposes).

31. See, e.g., Michael J. Kelly, *Executive Excess v. Judicial Process: American Judicial Responses to the War on Terror*, 13 IND. INT'L & COMP. L. REV. 787, 819 (2003) (arguing that "[t]he arrogance of power demonstrated by the Bush Administration in its legal responses to the terrorist attacks suffered by the country on September 11th, 2001 . . . cannot be allowed to continue unchallenged" and urging greater judicial action); Jeremy Brecher & Brendan Smith, *Attack Iran, Ignore the Constitution*, THE NATION (Apr. 21, 2006), [http://www.thenation.com/doc/20060508/attack\\_iran](http://www.thenation.com/doc/20060508/attack_iran) (discussing President Bush's "usurpation" of war powers); Elizabeth Drew, *Power Grab*, 53 N.Y. REV. OF BOOKS, June 22, 2006, available at <http://www.nybooks.com/articles/19092> (stating that the Bush White House has made an "unprecedented reach for power" and has made "claims of extraordinary presidential power"); Senator Dianne Feinstein, Remarks before the Queen's Bench Bar Association (May 29, 2006), available at <http://www.feinstein.senate.gov/06releases/r-queens-bench.pdf> (explaining the "calculated expansion of power under this President" and referring to "new legal theories" being advocated by the Bush White House); cf. Gerald E. Rosen, *The War on Terrorism in the Courts*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 101, 111 (2006) ("In the end, it is only the Judiciary—with its constitutional grant of independence from the political system—that can be the final gatekeeper of these critical rights at a time such as this.").

32. In offering this view I want to be clear that when I speak of judicializing federative power, I am for purposes of this project focusing my contentions on cases involving war powers specifically, rather than the entire realm of foreign relations cases that could arise in the civil and criminal justice systems and implicate judicial review (such as treaties and congressional-executive agreements), although some of the same arguments could obtain with regard to other areas of federative power.

and other public ministers and consuls,<sup>33</sup> historically American courts understood that questions touching upon war and foreign relations involved a different set of criteria, criteria that did not lend themselves easily to adjudication, particularly constitutional adjudication. Consequently, throughout our history, although American jurisprudence certainly has seen adjudication of cases touching upon international affairs and American foreign policy, courts have been more reluctant to involve themselves in questions about the proper allocation of constitutional war powers.<sup>34</sup>

Over the past four decades, that reluctance has been manifest in the Judiciary's application of the doctrines of justiciability—standing, ripeness, mootness, and the prohibition on advisory opinions, all of which are crucial to the formal separation of powers because their application deprives courts of the power to act—and the political question doctrine (both in its constitutional state and its prudential state, either of which also serves a critical function in circumscribing the power of courts).

I therefore identify three general eras of judicial treatment of cases relevant to constitutionally proscribed war power: (1) the developmental era, in which we see the Judiciary beginning to develop its own sense of how it will approach the judicial role, from the days of the early Supreme Court through the Civil War and the Court's decision in the *Prize Cases*,<sup>35</sup> (2) the definitional era, which is marked primarily by the Court's decisions in *United States v. Curtiss-Wright Export Corp.*<sup>36</sup> and *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>37</sup> in which the Court took bolder steps in attempting to define the nature of constitutional powers and their limits as applied in foreign affairs; and (3) the non-justiciability era, in which the courts were routinely called upon to determine whether particular executive actions violated the constitutional allocation of war powers, particularly in light of the enactment of the War Powers Resolution in 1973,<sup>38</sup> but where courts regularly used the doctrines of non-justiciability to avoid resolving those claims. I then suggest that, after the

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33. See U.S. CONST. art. III, § 2.

34. See Broughton, *supra* note 28, at 693–713; FRANCK, *supra* note 29, at 61–76.

35. 67 U.S. (2 Black) 635 (1863).

36. 299 U.S. 304 (1936).

37. 343 U.S. 579 (1952).

38. 50 U.S.C. §§ 1541–1548 (2000).

Supreme Court's recent war on terror decisions, there is reason to believe that we may be entering a new era in which the courts will judicialize—or play a more active role in policing—political exercises of federative power (and particularly those originating in the executive). I confess that the paucity of judicial review in the war powers arena, particularly in the nation's early years, makes this taxonomy imperfect and, frankly, awkward. However, my desire is to give some historical context and continuity to the prevailing, though now compromised, view of the judicial role in these types of cases.

#### A. *The Developmental Era*

Within the developmental era, some scholars place great emphasis on early cases like *Bas v. Tingy*,<sup>39</sup> *Talbot v. Seeman*,<sup>40</sup> and *Little v. Barreme*,<sup>41</sup> all of which placed the Supreme Court in the middle of controversies arising from the American seizure of foreign ships in the late 1700s and early 1800s. A few scholars contend that these cases provide the earliest affirmation of the judicial role in refereeing disputes over the power to wage war and make foreign policy.<sup>42</sup> When viewed this way, at a high level of abstraction, it is undeniable that these are significant cases. But viewing them at this level of generality leads one to somewhat overstate their significance. Viewed with a greater degree of circumspection, these early cases merely concerned the domestic and legal effects of existing war, and the rights of individuals as implicated in private lawsuits arising from wartime political action; none of them involved constitutional questions about the allocation or distribution of federative power.<sup>43</sup> They were, rather, modest forays into the realm of international relations that involved the interpretation and application of federal statutes; they did not set a precedent for more expansive judicial review of inter-branch disputes concerning the exercise of federative power.

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39. 4 U.S. (4 Dall.) 37 (1800).

40. 5 U.S. (1 Cranch) 1 (1801).

41. 6 U.S. (2 Cranch) 170 (1804).

42. See, e.g., Corn, *supra* note 29, at 209–12 (arguing that the Quasi-War cases offer historical evidence that courts can be involved in adjudicating war powers disputes); ELY, *supra* note 13, at 55 (explaining that *Little* is an example of judicial review of war powers controversies).

43. See Yoo, *Politics by Other Means*, *supra* note 13, at 293.

Indeed, often overlooked are other early cases that set precedents for a more circumscribed judicial power.<sup>44</sup> The origin of the Court's doctrine on advisory opinions (a doctrine that serves as an important structural basis for other limits on judicial power, such as the adequate and independent state ground doctrine) emerged from a famous early controversy over federative power: the question of neutrality in the war between England and France.<sup>45</sup> This, of course was the occasion for Pacificus and Helvedius's commentary on the nature and scope of constitutional federative power, but we often forget that Secretary of State Jefferson had asked the Supreme Court to intervene by answering a series of questions concerning President Washington's power to proclaim American neutrality.<sup>46</sup> Chief Justice John Jay sent a letter back to Jefferson, stating that the Court refused to enter the dispute, citing the Constitution's formal separation of powers and the formal role of courts, and saying that the Court would not "extra-judicially" decide upon Jefferson's questions.<sup>47</sup>

Even *Marbury v. Madison*,<sup>48</sup> though not a case about federative power specifically, is instructive, for *Marbury* provides the doctrinal origin of the political question doctrine.<sup>49</sup> Indeed, Chief Justice Marshall's *Marbury* opinion specifically identifies federative power as an area in which the Judiciary should avoid interfering with discretionary acts of the President.<sup>50</sup> As we will see when we consider the contemporary cases, the political question doctrine plays (as it should) a critical role in

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44. See, e.g., *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (deferring to political branches in controversy concerning America's alleged violation of treaty with France when it seized ship near Haiti); see also Ariel N. Lavinbuk, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Court's Docket*, 114 YALE L.J. 855 (2005) (applying a political science analysis to empirically examine the Court's early foreign policy docket).

45. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 54 (2d ed. 2002) (discussing the development of the ban on advisory opinions as arising during the Washington Administration).

46. See BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 25 (1993).

47. See Letter from Chief Justice John Jay and the Associate Justices to President George Washington (Aug. 8, 1793), in JESSE H. CHOPER ET AL., *CONSTITUTIONAL LAW* 1547 (10th ed. 2006).

48. 5 U.S. (1 Cranch) 137 (1803).

49. *Id.* at 169–70 ("The province of the court is . . . not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, . . . can never be made in this court.")

50. *Id.* at 166.

determining whether judicial review is appropriate as to a particular question of constitutional war power.<sup>51</sup>

Consider also the Supreme Court's divided decision in the *Prize Cases*, which marks the outer boundary of the developmental era, and in which the Court upheld President Lincoln's order to block southern ports during the Civil War.<sup>52</sup> Again, the Court does not enter the thicket of determining the existence of a war or defining the boundaries of presidential versus congressional action; although this was the first, and perhaps last, case to articulate in a formal holding the nature of presidential war power. Justice Grier's opinion made explicit its deference to the President, recognizing that the level of force to be employed while acting as Commander-in-Chief is a determination that only the President can make.<sup>53</sup> "Whether the President in fulfilling his duties, as Commander in-chief [sic], in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents," the opinion explained, "is a question to be decided by *him*, and this Court must be governed by the decisions and acts of the political department of the government to which this power was entrusted."<sup>54</sup> The *Prize Cases* thus provide perhaps the most useful paradigm from this era for judicial deference, as opposed to abstention, in war powers controversies.

### B. *The Definitional Era*

The next era—the definitional era—comes in the twentieth century, where two cases stand out above all others for their influence in determining the nature and scope of constitutional federative powers, although neither case, properly understood,

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51. See *infra*, Section II.C; see also Abner J. Mikva, *The Political Question Revisited: War Powers and the "Zone of Twilight"*, 76 KY. L.J. 329, 336 (1987) ("Over the years, the political question doctrine has had particular resiliency in cases involving foreign policy."); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 946–50 (2004) (discussing application of the political question doctrine in foreign affairs cases, from *Marbury* to the modern era); but cf. FRANCK, *supra* note 29, at 31–44 (discussing, and questioning, the development of the political question doctrine in foreign affairs cases). For an excellent discussion of the doctrine beyond the foreign affairs realm, see Rachel Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

52. 67 U.S. (2 Black) 635, 671 (1863).

53. *Id.* at 670.

54. *Id.* (emphasis added).

involved the actual adjudication of a constitutional question about the scope of federative power specifically. Indeed, the most famous portions of each case were not, strictly speaking, binding judicial authority: in *Curtiss-Wright*,<sup>55</sup> Justice Sutherland's notorious discussion of executive supremacy in foreign affairs; and in *Youngstown*,<sup>56</sup> the *Steel Seizure Case*, Justice Jackson's concurring opinion establishing what has been adopted as the operative modern constitutional taxonomy of executive power *vis-a-vis* the Congress.

In *Curtiss-Wright*, Justice Sutherland, borrowing from an important early House speech by John Marshall and from Pacificus's description of the executive,<sup>57</sup> stated that the President is the "sole organ of the [United States] in the field of international relations."<sup>58</sup> He also drew the critical distinction between domestic and foreign affairs and stated that "the President alone has the power to speak or listen as a representative of the nation."<sup>59</sup> Scholars have, quite properly, noted some of the flaws in Justice Sutherland's *Curtiss-Wright* opinion, notably his failure to account for congressional foreign relations powers granted specifically by the Constitution and for his discussion of the nature and scope of executive powers over international affairs despite the fact that this discussion was unnecessary to the Court's resolution of the precise issue in that case—that Congress could constitutionally delegate power to the President to halt arms sales to warring nations in South America.<sup>60</sup> Sutherland's dicta, however, has proven remarkably resilient despite the scholarly criticism, and is frequently cited by those defenders of a more purely Lockean version of

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55. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

56. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

57. 6 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall); Hamilton, *supra* note 22, at 54 (describing the executive as the "organ of intercourse between the nation and other nations"). It is doubtful that Marshall, in particular, intended his remarks to sweep as broadly as Sutherland's theory. Nonetheless, this speech, one of the most important in congressional history and one given after Hamilton had left federal service, demonstrates Marshall's emerging role as a chief Federalist voice and previews the understanding of federal power that Marshall would describe in *Marbury*. See also Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127 (1999) (writing that *Curtiss-Wright's* plenary executive powers dicta is grounded in late-19th Century jurisprudence of inherent plenary powers).

58. *Curtiss-Wright*, 299 U.S. at 320.

59. *Id.* at 319.

60. See FISHER, *supra* note 13, at 69–73; FRANCK, *supra* note 29, at 15; KOH, *supra* note 13, at 94.

distributing federative power.<sup>61</sup> Indeed, *Curtiss-Wright* stands alongside Hamilton's *Pacificus* essays as an example of the appeal of Lockean federative power theory to the practice of governance in American history.

Moreover, as significant as the *Steel Seizure Case* has become to assessing separation of powers problems (and Justice Jackson's opinion, though it did not garner a majority of votes, has emerged over time as the dominant rule in this area, as reflected by the Court's decision in, for example, *Dames & Moore v. Regan*<sup>62</sup>), it is important to recall that *Youngstown* did not involve federative power per se, nor is its rule or Justice Jackson's taxonomy limited to foreign affairs problems. Nor does Justice Jackson's approach suggest that courts should offer aggressive judicial review even where his categories of power are implicated; rather, Justice Jackson concedes that Congress should use its own institutional tools and political self-help rather than expect assistance from the federal Judiciary.<sup>63</sup> In fact, during this same era, Justice Jackson wrote in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are

61. See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (citing *Curtiss-Wright* while upholding a criminal conviction for evading Canadian liquor import taxes); *Hamdi v. Rumsfeld*, 542 U.S. 507, 582 (2004) (Thomas, J., dissenting) (citing *Curtiss-Wright* to suggest the President's need for independent authority in foreign affairs justifies the detention of Hamdi as an enemy combatant); *Goldwater v. Carter*, 444 U.S. 996, 1004–05 (1979) (Rehnquist, J., concurring in the judgment) (citing *Curtiss-Wright* to support finding that suit was non-justiciable because it involved foreign affairs external to the United States); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (citing *Curtiss-Wright* with approval); *Haig v. Agee*, 453 U.S. 280, 289 n. 17 (1981) (distinguishing the issue from the one in *Curtiss-Wright*).

For a good discussion of *Curtiss-Wright's* historical significance in reshaping foreign affairs law, see G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999).

62. 453 U.S. 654 (1981).

63. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring); see also *Exercising Congress's Constitutional Power to End a War: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Professor Robert Turner) (stating that both the Jackson concurrence and majority opinion "emphasize that they were not endeavoring to constrain the powers of the President in dealing with the external world").

decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.<sup>64</sup>

*Curtiss-Wright* and *Youngstown*, then, provide competing definitions of constitutional federative power: whereas *Curtiss-Wright* defines federative power as implicating national sovereignty and centralized in the executive (per Locke), *Youngstown* can be applied to limit executive flexibility to deal with the necessities of the international arena. Yet neither case tells us precisely how active the *judicial* role should be in policing exercises of constitutional war power. Moreover, Justice Jackson's opinion in *Chicago & Southern Air Lines* provides at least a theoretical basis for either judicial abstention or at least for the kind of deference we see in the *Prize Cases*. So while this era gives us some definition (albeit conflicting ones) of the nature of constitutional powers, it provides only ambiguous guidance as to the scope of judicial power to resolve controversies about the allocation of constitutional war and foreign affairs authority.<sup>65</sup>

### C. *The Non-Justiciability Era*

Thus far, our focus has been upon the Supreme Court. By the 1960s, though, armed with the *Youngstown* precedent, litigants began asking lower courts to decide explicitly whether presidential action had violated the constitutional allocation of federative powers. In addition, a statutory challenge (or, as it became, a constitutional challenge with a statutory overlay) became more palatable after Congress enacted the War Powers Resolution over President Nixon's veto in 1973.<sup>66</sup> By this time,

64. 333 U.S. 103, 111 (1948).

65. That ambiguity is reinforced if we look at the Court's approach in another opinion from this era written by Justice Jackson, *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Eisentrager* held that the Court lacked jurisdiction to hear a habeas petition filed by German prisoners held in occupied Germany by American forces. *Id.* at 790. Justice Jackson's opinion there is littered with language of deference to political authorities managing war. *Id.* at 779. Both the formal holding, and underlying rationale of *Eisentrager*, however, have been undermined by *Rasul v. Bush*, 542 U.S. 466 (2004). See *Standards for Military Commissions: Hearing Before the H. Comm. on Armed Services*, 109th Cong. (2006) (statement of former Solicitor General Theodore B. Olson) (criticizing *Rasul's* treatment of *Eisentrager*).

66. 50 U.S.C. §§ 1541–1548 (2000); see also 1973 PUBLIC PAPERS OF THE PRESIDENTS 893 (describing President Nixon's constitutionally based veto).

however, the Court had also decided *Baker v. Carr*,<sup>67</sup> which established the modern framework for applying the political question doctrine. Consequently, despite the appearance that *Youngstown* provided all of the analysis necessary to judge whether a presidential act of war-making violated the Constitution's distribution of powers, lower courts beginning in the 1960s refused to become entangled in the hotly debated question of whether a particular presidential decision of war was unconstitutional.<sup>68</sup> The primary point of departure here is the Vietnam War, and especially President Nixon's orders related to the bombing in Cambodia, which were the subject of many lawsuits in the lower federal courts challenging the President's authority to initiate hostilities in the absence of a congressional declaration of war, but the legal basis for the litigation was adopted with regard to subsequent military operations in the 1980s and 1990s.<sup>69</sup> No court ever ruled upon the constitutionality of presidential war-making in these cases. Instead, the lower courts used the political question doctrine and the doctrines of standing, ripeness, and mootness to dispose of these cases.

In *Orlando v. Laird*, *Massachusetts v. Laird*, and *Mitchell v. Laird*, for example, courts applied various forms of the political question doctrine to avoid ruling on the merits of service members' constitutional challenges to presidential initiation and conduct of hostilities in Vietnam.<sup>70</sup> Similarly, in *DaCosta v. Laird*, the Second Circuit applied the doctrine where an Army Specialist stationed in Vietnam questioned whether the President could order mining of Vietnamese ports and harbors.<sup>71</sup> This trend continued in the 1980s and 1990s when lower courts used the justiciability doctrines to turn away challenges under Article I and the War Powers Resolution to presidential decisions to involve the U.S. in hostilities in El Salvador and Nicaragua (under President Reagan),<sup>72</sup> the Persian Gulf (under

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67. 369 U.S. 186 (1962).

68. See Broughton, *supra* note 28, at 701–04.

69. See *id.* at 701–07.

70. *Orlando v. Laird*, 443 F.2d 1039, 1042–44 (2d. Cir. 1971); *Massachusetts v. Laird*, 451 F.2d 26, 28–34 (1st Cir. 1971); *Mitchell v. Laird*, 488 F.2d 611, 614–16 (D.C. Cir. 1973).

71. 471 F.2d 1146, 1147–48, 1152–57 (2d Cir. 1973).

72. See *Crockett v. Reagan*, 558 F. Supp. 893, 898–903 (D.D.C. 1982); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208–09 (D.C. Cir. 1985).

President Reagan and the first President Bush),<sup>73</sup> and Kosovo (under President Clinton).<sup>74</sup> The D.C. Circuit's decision in *Campbell v. Clinton*, which challenged President Clinton's use of airstrikes in Kosovo, also provides a particularly useful discussion between Judges Silberman and Tatel concerning justiciability in war powers cases.<sup>75</sup> Judge Silberman espoused a robust political question doctrine while Judge Tatel was less sanguine about the doctrine, acknowledging a role for the courts in war powers questions.<sup>76</sup>

Most recently, the First Circuit Court of Appeals used the ripeness doctrine to reject a challenge—brought by service members, their families, and various members of Congress—to President Bush's use of military force in Iraq.<sup>77</sup> Although the court acknowledged that the political question doctrine is “famously murky” and that its reliance on that doctrine has been historically “sparing,” it nonetheless concluded that ripeness afforded the clearest and most principled basis for disposing of the lawsuit.<sup>78</sup> Congress could take some immediate action that would affect troop deployment, the Iraqis could act in a manner that would avert further hostilities, investigations by weapons inspectors continued in Iraq—a number of contingencies remained that made the suit premature.<sup>79</sup> In addition, although not strictly a war powers case, the District Court for the District of Columbia rejected a challenge to President Bush's unilateral withdrawal from the Anti-Ballistic Missile Treaty.<sup>80</sup> In this suit, brought exclusively by members of the House of Representatives (led by Representative Dennis Kucinich, an Ohio Democrat), the court disposed of the matter on both standing and political question grounds.<sup>81</sup>

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73. See *Lowry v. Reagan*, 676 F. Supp. 333, 337–41 (D.D.C. 1987); *Dellums v. Bush*, 752 F. Supp. 1141, 1144–52 (D.D.C. 1990); *Ange v. Bush*, 752 F. Supp. 509, 510–17 (D.D.C. 1990).

74. See *Campbell v. Clinton*, 203 F.3d 19, 20–24 (D.C. Cir. 2000).

75. *Id.* at 24–28, 37–41 (Tatel, J., concurring); see also Broughton, *supra* note 28, at 707–13 (analyzing *Campbell*).

76. Compare *Campbell*, 203 F.3d at 24–25 (Silberman, J., concurring), with *id.* at 37–41 (Tatel, J., concurring).

77. *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003).

78. *Id.* at 140.

79. *Id.* at 139.

80. *Kucinich v. Bush*, 236 F. Supp. 2d 1, 2 (D.D.C. 2002).

81. *Id.* at 3–12, 14–18; see also *Mahorner v. Bush*, 224 F. Supp. 2d 48, 49–53 (D.D.C. 2002) (dismissing on standing and political question grounds a lawsuit challenging Bush Administration policy toward Middle East).

Although most of the action during this era occurred in the lower courts, the Supreme Court, too, articulated a relatively robust political question doctrine for foreign affairs. First, in *Gilligan v. Morgan*, a case arising out of the tragedy at Kent State University, the Court refused to order federal court supervision of National Guard troops, holding instead that making rules for training and discipline of the militia was a power committed exclusively to the Congress under Article I, section 8.<sup>82</sup> And again, a four-Justice plurality invoked the doctrine in *Goldwater v. Carter*, which, although not a war powers case (it concerned President Carter's unilateral termination of the Mutual Defense Treaty with Taiwan), provides a useful discussion of federative power distribution, particularly in light of the *Curtiss-Wright* dicta.<sup>83</sup>

This era thus demonstrates that, although armed with precedent for upsetting presidential war-time decisionmaking on constitutional grounds, the courts acknowledged a prudential sensitivity to their own institutional limits and helped to effectuate the Constitution's vision of give-and-take and self-help among the political branches in exercising foreign affairs power.<sup>84</sup>

#### D. An Emerging Era of Judicialization?

With respect to questions about the constitutional allocation of powers in war powers cases, the model developed in what I have termed the non-justiciability era—in which the doctrines of justiciability, complemented by a prudential sensitivity about the uniqueness of such matters that required judicial deference—still presumably applies. However, the model is confounded (or at least potentially so) by the Supreme Court's recent war on terrorism cases.

Three cases are noteworthy in this respect: (1) *Hamdi v. Rumsfeld*, which rejected the kind of broad, pro-Executive view of

82. 413 U.S. 1, 5–12 (1973).

83. 444 U.S. 996, 1004–05 (1979) (Rehnquist, J., concurring in the judgment).

84. See Broughton, *supra* note 28, at 719–24; see also Jonathan L. Entin, *The Dog That Rarely Barks: Why Courts Won't Resolve the War Powers Debate*, 47 CASE W. RES. L. REV. 1305, 1307–13 (1997) (explaining that “there are various procedural and jurisdictional obstacles to litigating over war powers and foreign affairs”); Mikva, *supra* note 51, at 339 (stating that “if a court wishes to avoid deciding a war powers question, it has the doctrinal tools to do so”); Sidak, *supra* note 13, at 114–15 (explaining that even if war powers disputes are justiciable, courts will have difficulty framing a remedy and can use the doctrines of ripeness and mootness to foreclose judicial review).

constitutional war and foreign affairs powers that has its philosophical origins in Locke, and later in Pacificus and Marshall, and which made clear that judicial review in the foreign policy arena would not be circumscribed when the litigation implicates individual rights of an American citizen;<sup>85</sup> (2) *Rasul v. Bush*, which held that even non-citizen enemy combatants held outside the jurisdiction of the United States could have the privilege of seeking habeas corpus relief from their detention;<sup>86</sup> and, most recently, (3) *Hamdan v. Rumsfeld*, which once again rejected broad assertions of presidential war power and which appears to sanction a judicial approach that places the Court now firmly in the business of judging and adjudicating the details of presidential (or even congressional) decisions regarding war policy.<sup>87</sup> Indeed, the Court now seems to be laying the foundation for a continuing judicial policy of micromanaging wartime decisionmaking by the political branches.

*Hamdi* and *Hamdan* are particularly worthy of discussion here, for in each case the Court articulates not simply a role for the Judiciary in these matters, but an aggressive, non-deferential, interventionist role. In *Hamdi*, Justice O'Connor wholly rejects the federal Government's position that the courts lack the institutional competence to supervise the executive's military decisionmaking and that the separation of powers mandates a circumscribed role for the courts here.<sup>88</sup> Although she concedes that she does not address directly the broader question concerning the Court's role in war powers controversies more generally, Justice O'Connor makes clear that when executive war-making implicates individual rights, the Constitution envisions a role for all three branches.<sup>89</sup> Indeed, Justice O'Connor's opinion suggests that the result of a more deferential judicial model would be the condensing of power into a single branch.<sup>90</sup> Still, despite the lack of deference and the Court's aggressive application of due process balancing to the detention of citizen combatants, the plurality is careful to insist

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85. 542 U.S. 507, 533 (2004).

86. 542 U.S. 466, 478–479 (2004).

87. 126 S.Ct. 2749, 2759–60 (2006).

88. *Hamdi*, 542 U.S. at 535–36.

89. *Id.* at 536.

90. *Id.*

that the political branches retain sufficient flexibility to craft procedures that would satisfy Hamdi's due process rights.<sup>91</sup>

Apparently, though, this kind of flexibility remains subject to the Court's omnipresent watchful eye, as *Hamdan* illustrates. In the complicated *Hamdan* decision, a Court majority endorsed three major holdings: that (1) notwithstanding Congress's attempt in the Detainee Treatment Act to foreclose habeas relief for Guantanamo Bay detainees, courts have jurisdiction over habeas petitions that were filed before the DTA's effective date;<sup>92</sup> (2) the military commission structure is inconsistent with the Uniform Code of Military Justice;<sup>93</sup> and (3) Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda.<sup>94</sup> Notable in *Hamdan* is the sum of the language that the Court uses in questioning the existence of military necessity.<sup>95</sup> And the majority—neither in Justice Stevens's opinion nor in the separate opinions by Justice Kennedy or Justice Breyer—makes no meaningful effort (unlike the plurality in *Hamdi*) to reassure us of the Court's sensitivity to the limits on its role generally, and particularly in cases involving war powers and foreign affairs.<sup>96</sup> Rather, *Hamdan* subjects the President's contentions to exacting scrutiny, giving no deference whatsoever: it resolves any uncertainty about the DTA against the President;<sup>97</sup> it assumes that the congressional authorization was not specific enough to justify Hamdan's military commissions;<sup>98</sup> Justice Stevens even endorses the proposition that *Hamdan* cannot be prosecuted for conspiracy.<sup>99</sup> The Court's review in *Hamdan* resembles its application of strict scrutiny in some areas of constitutional law in which it presumes the unconstitutionality of a law and places the burden on the government to justify the law by demonstrating that it is narrowly tailored to further a

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91. *Id.* at 538–39.

92. *Hamdan*, 126 S.Ct. at 2764–69.

93. *Id.* at 2773–86.

94. *Id.* at 2793–98.

95. *Id.* at 2785.

96. Justice Kennedy, for example, notes that although the Court can give “some deference” to the President's practicality judgments, a lower degree of deference is afforded here because of the contrast in language that Congress used here. *See id.* at 2801 (Kennedy, J., concurring in part).

97. *Id.* at 2769.

98. *Id.* at 2775.

99. *Id.* at 2779–80.

compelling governmental interest.<sup>100</sup> Of course, strict scrutiny is ordinarily an element of *constitutional* adjudication, and *Hamdan* is not a constitutional case, but the aggressive review here, and the lack of deference, suggests that the comparison is a fitting one. No one reasonably expected the Court to defer to presidential prerogatives in the manner of *Curtiss-Wright*, but the regime of judicial review that *Hamdan* represents is far from the carefully circumscribed view of the judge's role that Justice Jackson articulated in *Chicago & Southern Air Lines*, and arguably goes beyond the modest role that Justice O'Connor endorsed in *Hamdi*, which by its terms extended judicial protection during a state of war only to American *citizens*.<sup>101</sup>

Importantly, neither *Hamdi* nor *Hamdan* express a view about the proper allocation of constitutional war power; *Hamdan*, in fact, issues no constitutional rulings at all (Justice Kennedy's separate concurrence in *Hamdan*, however, refers to *Youngstown* and says that this is a case where the President's authority is at its lowest ebb under Justice Jackson's taxonomy).<sup>102</sup> In addition, in both *Hamdi* and *Hamdan*, the Court expressly avoids the more difficult constitutional war powers problem of whether the presidential actions were justified by inherent authority under Article II, because Congress here had authorized the actions.<sup>103</sup> Moreover, *Hamdi*, *Hamdan*, and *Rasul* all involved habeas litigation, which by definition requires the involvement and review of courts. It is worth considering, however, how the Court would react if Congress had not authorized the actions (a problem the Court would have had to confront in *Hamdi* had it decided the Authorization for Use of Military Force did not authorize the detainment of Hamdi) or if the questions presented occurred outside the habeas context. It is not difficult to imagine a scenario (as has happened; consider the previous subsection) in which a President of one party engages in military decisionmaking pursuant to his Article II powers with which a

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100. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (applying strict scrutiny to Equal Protection Clause challenge to race-based law school admissions policy); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (applying strict scrutiny to content based regulation of speech); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (applying strict scrutiny to Free Exercise Clause challenge to city ordinance that was not religion-neutral or generally applicable).

101. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004) (stating that the Court's holding protected American citizens).

102. *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring in the judgment).

103. See *Hamdi*, 542 U.S. at 517.

Congress of another party takes issue, prompting litigation. The 110th Congress, in fact, offers another such possibility: emboldened by a new Democratic majority in each house of Congress and increasing unpopularity of the war in Iraq, the 110th Congress has already seen the introduction of legislation (though some of it in the form of non-binding resolutions) and legislative hearings in which members have questioned an increase in American troop strength and contemplated their own authority to bind President Bush's conduct of the war.<sup>104</sup>

More could be said about these decisions, *Hamdan* in particular, but it is not my project here to provide a comprehensive comment upon the cases; others have done so, and better than could I.<sup>105</sup> Rather than belabor the details further in this subsection, I prefer to make an observation concerning Justice Thomas that has gone mostly unnoticed in the recent commentary concerning the Court's war on terror decisions.

Justice Thomas was alone in dissent in *Hamdi*<sup>106</sup> (Justices Scalia and Stevens also dissented, but on grounds that the Government should have prosecuted Hamdi for treason or suspended the writ of habeas corpus),<sup>107</sup> and a dissenter in *Hamdan*<sup>108</sup> and *Rasul*.<sup>109</sup> He wrote separately in *Hamdi* and *Hamdan*, speaking exclusively for himself in *Hamdi*, and joined only in part by Justices Scalia and Alito in *Hamdan*.<sup>110</sup> Through these decisions, it appears as though Justice Thomas has now emerged as the

104. See, e.g., S. 433, 110th Cong. (2007) (sponsored by Sen. Obama, expressing United States policy for Iraq); S. Con. Res. 2, 110th Cong. (2007) (sponsored by Sen. Biden, expressing a bipartisan resolution in Iraq); S. 121, 110th Cong. (2007) (sponsored by Sen. Feingold, providing for redeployment of United States forces from Iraq); *Exercising Congress's Constitutional Power to End a War: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007); see also S. Res. 39, 110th Cong. (2007) (sponsored by Sen. Byrd, expressing sense of the Senate that Congress approve any offensive military action by United States against any other nation).

105. See, e.g., *Standards for Military Commissions: Hearing Before the H. Comm. on Armed Services*, 109th Cong. (2006) (statements of former Solicitor General Theodore B. Olson and then-Acting Assistant Attorney General for the Office of Legal Counsel Steven G. Bradbury); *Hamdan v. Rumsfeld: Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Dean Harold Hongju Koh); *Hearing Before the S. Comm. on Armed Services*, 109th Cong. (2006) (statement of Attorney General Alberto Gonzales); Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006).

106. 542 U.S. at 579–99 (Thomas, J., dissenting).

107. *Id.* at 554–79 (Scalia, J., dissenting).

108. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2823–49 (2006) (Thomas, J., dissenting).

109. *Rasul v. Bush*, 542 U.S. 466, 488–506 (2004) (Scalia, J., dissenting).

110. 126 S. Ct. at 2823–49 (Thomas, J., dissenting).

only member of the Court to embrace fully a robust regime of judicial deference in cases implicating presidential exercises of war power. His constant citation to the *Prize Cases* is evidence of this.<sup>111</sup> He also appears, though not quite as directly as even he might prefer, to champion a robust executive role in exercising federative power in addition to a highly deferential judicial model for foreign affairs cases. As he explained in *Hamdi*, “Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary executive.”<sup>112</sup> Turning the tables on those who rely upon Justice Jackson’s *Youngstown* opinion, Justice Thomas cites Justice Jackson’s opinion in *Chicago & Southern Air Lines* (“the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative,” Justice Thomas reminds us).<sup>113</sup> Justice Thomas’s vision of federative power, then, looks downright Hamiltonian, even Lockean, and sets him apart from each of his colleagues on the Court.<sup>114</sup>

### III. AGAINST JUDICIALIZATION

Having described the historical treatment of foreign affairs in the courts, and the recent trend toward more aggressive judicial review of presidential war-making decisions, a few normative observations are in order. These observations relate not simply to the Court’s treatment of foreign affairs, but, more broadly, to its own understanding of its role as an institution in the constitutional design.

My contention is not simply that courts should be more deferential—or in some instances entirely uninvolved—in many of these cases, although I adhere to these notions. Scholars like

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111. *See id.* at 2824–28, 2849; *Hamdi*, 542 U.S. at 581 (Thomas, J., dissenting).

112. *Hamdi*, 542 U.S. at 582 (Thomas, J., dissenting).

113. *Id.* (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

114. This development furthers my (entirely plausible) belief that, from the perspective of constitutional jurisprudence and particularly taking into account his positions in the Commerce Clause arena, Justice Thomas is perhaps the most interesting figure on this Supreme Court.

Rachel Barkow<sup>115</sup> and Jide Nzelibe,<sup>116</sup> have persuasively advocated a robust political question doctrine and doctrines of deference that ensure the courts will only exercise their ability to act in cases where they are specially empowered or otherwise competent to do so. And in response to those who contend that these cases are within the judicial ken because “this is what judges do” (consider Judge Tatel’s concurring opinion in *Campbell*),<sup>117</sup> those like Justice Thomas respond with a compelling assertion grounded in sensible notions of institutional competence: unlike many cases involving domestic affairs, judges lack sufficient competence, expertise, and facilities to delve too deeply into war powers problems.<sup>118</sup> In fact, the notion espoused by critics of the doctrine, notably Professor Franck, who argue that the political question approach undermines the rule of law which demands a role for judges in addressing constitutional questions related to the allocation of war and foreign affairs powers, must face “insuperable obstacles,” as Professor Nzelibe has explained;<sup>119</sup> notably, its incompatibility with constitutional text, structure, and history. Courts are not the exclusive interpreters of the Constitution; indeed, as Hamilton, Madison, and Marshall explained in the early years of the Republic after ratification,<sup>120</sup> the political

115. See Barkow, *supra* note 51, at 319–36 (calling for “judicial modesty” and expanding the use of the “classical political question” doctrine).

116. See Nzelibe, *supra* note 51, at 999–1009 (employing the “balance of institutional competencies” approach, which envisions judicial review of foreign affairs cases along a spectrum that includes cases implicating individual rights and those in which Congress has acted).

117. See *Campbell v. Clinton*, 203 F.3d 19, 37 (D.C. Cir. 2000) (Tatel, J., concurring) (arguing that courts are competent to determine the existence of a war just as they are able to answer other difficult constitutional questions).

118. See *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting) (noting the Court’s “institutional inability to weigh competing concerns correctly”); cf. Nzelibe, *supra* note 51, at 1005–06 (adopting approach based on institutional competency that accepts greater judicial competence in cases implicating individual rights, rather than those involving foreign affairs powers without challenges based on rights claims).

119. Nzelibe, *supra* note 51, at 968.

120. See Hamilton, *supra* note 22, at 58 (explaining as *Pacificus* that the executive’s power to enforce the law necessarily implies his ability to interpret the laws first); 1 ANNALS OF CONG. 520 (Joseph Gales ed., 1789) (statement of Rep. Madison) (“I beg to know, upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments?”); John Marshall, Speech to the House of Representatives of March 7, 1800, in 4 THE PAPERS OF JOHN MARSHALL at 95 (Charles T. Cullen ed. 1984) (stating that the separation of powers would be “swallowed up by the judiciary” if judicial power extended to every question under the laws and treaties of the United States, as “it would involve almost every subject on which the executive could act”).

branches play an important role in constitutional deliberation and interpretation,<sup>121</sup> and there are multiple provisions of the Constitution that are not amenable to constitutional adjudication in the courts (for example, a congressional determination as to what constitutes “high Crimes or Misdemeanors”<sup>122</sup> or whether the President has properly exercised his veto powers<sup>123</sup>). Moreover, in addition to the historical constitutional practice of judicial non-intervention in war powers controversies and the Constitution’s structural design for allowing the Congress and President to engage in their own constitutional deliberation on the scope and nature of their respective war powers, we can point to the Constitutional Convention, at which Madison argued that the judicial power should extend only to cases of a “Judiciary Nature,”<sup>124</sup> and at which the Framers explicitly rejected a proposed Council of Revision that would have given the Judiciary a joint role in exercising veto power with the Executive.<sup>125</sup> Also, as a textual and structural matter, we know that the Framers approved the placement of certain categories of power belonging to one branch in another branch (for example, the Senate enjoys a judicial power to try impeachments<sup>126</sup> and the President enjoys legislative power to return a bill and to recommend legislation to Congress<sup>127</sup>). Yet nowhere in Article III or elsewhere do the Framers give any legislative or executive power to the Judiciary (a structural choice further reflected in the Convention’s rejection of the Council of Revision).

An approach grounded in a robust political question doctrine is also sensible especially when we think about the nature of federative power theory. Locke based the federative power upon the kind of authority man had in the state of nature; whereas law

121. See Broughton, *supra* note 28, at 719–24; Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 717–31 (1985); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 373–83 (1997); Eugene W. Hickok, Jr., *The Framers’ Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. 217 (1986); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1336–37 (2001); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1279–80 (1996).

122. U.S. CONST. art. II, § 4.

123. *Id.* art. I, § 7.

124. 2 RECORDS, *supra* note 18, at 430.

125. 1 RECORDS, *supra* note 18, at 20–21, 104–40.

126. U.S. CONST. art. I, § 3.

127. *Id.* art. I, § 7, art. II, § 3.

could direct the exercise of executive power, federative power was not amenable to such directives, but rather relied upon the exercise of prudence and discretion<sup>128</sup> (a notion reaffirmed by Publius and Pacificus). As the *Hamdan* decision foreshadows, judicial efforts to police such prudence and discretion will invariably involve the courts' own independent judgments about the normative propriety or acceptability of political action. This is not a judgment for politically independent courts.

But beyond these doctrinal constraints—and the problem of competence that I, too, find persuasive as a reason for robust doctrines that keep judicial review from doing mischief—I advocate normative limitations on judicial review grounded in a constitutionalist conception of institutional structure and responsibility. My contention is that the judicialization of federative power—by which I mean a model of judicial review that strictly and aggressively scrutinizes the constitutional allocation of federative power or a particular exercise of federative power—undermines the constitutional scheme for making, enforcing, and restraining American foreign policy. These arrangements are preferable to judicial review because they respect the forms of the Constitution and are more consistent with the institutional structures that the Constitution envisions for the exercise of federative power. In this sense, it is disconcerting that Justice Thomas has so often spoken only for himself on this matter.

Unfortunately, Americans have grown accustomed to resolving essentially political disputes in the courts, and the courts have only encouraged this phenomenon, so much so that today the Supreme Court is viewed as yet another political body, existing to satisfy the immediate appetites of a demanding public.<sup>129</sup> As *The Deconstitutionalization of America* explains, “the conviction that judicial actors are also political actors can have undesirable effects on the behavior of citizens.”<sup>130</sup> Thus, what emerges is a litigation culture that perpetually seeks out the Judiciary for relief from disagreeable policies, bypassing the

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128. See LOCKE, *supra* note 1, at 77 (“And though this *federative power* . . . is much less capable to be directed by antecedent, standing, positive laws, than the *executive*, and so must necessarily be left to the prudence and wisdom of those, whose hands it is in, to be managed for the public good . . .”).

129. See BARRUS ET AL., *supra* note 3, at 112; ROBERT H. BORK, *THE TEMPTING OF AMERICA* 2 (1990).

130. BARRUS ET AL., *supra* note 3, at 112.

complexity that accompanies coalitional politics and day-to-day policymaking.<sup>131</sup> War and foreign affairs cases for most of our history have proven to be the exception; no areas of law and public policy have provoked such ready employment of the doctrines of justiciability, or other moments of judicial deference, as war and foreign affairs. Thoughtful scholars like Professor Franck and Dean Koh have disparagingly described this history as “judicial abdication” or “judicial tolerance.”<sup>132</sup> I prefer to think of it as prudent circumspection, a virtuous trait for a limited and independent Judiciary. But perhaps the war on terror cases foreshadow a change. I am reluctant to overstate the case; it is important to understand that none of these cases were cases *about* the separation of powers in any direct sense, and their holdings did not concern directly the constitutional allocation of federative power. They are, admittedly, imperfect symbols of a shifting approach. Still, the aggressiveness of the Court’s review, and of its rebuke of the President’s asserted constitutional role, presents an ominous sign.

The contemporary Supreme Court is all about courts. Far from prudently circumspect, this Court possesses an imperial understanding of its own role in the constitutional scheme (provoked by a citizenry that has been asking more and more of the federal government for some sixty years now). It assumes its competence (indeed, its superior judgment) in virtually all areas of political life, in ways that, as I have argued in a recent article concerning the Court’s death penalty jurisprudence, signify a kind of judicial omnipotence and omniscience.<sup>133</sup>

This is evident in the Court’s death penalty cases, like *Atkins v. Virginia*<sup>134</sup> and *Roper v. Simmons*,<sup>135</sup> where the Court constitutionalized the superiority of its moral and political views on capital punishment by holding that the Eighth Amendment contemplated that “in the end, *our own judgment* will be brought to bear on the question of the acceptability of the death penalty. . . .”<sup>136</sup> It is also evident in the Court’s recent political

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131. See J. Richard Broughton, *The Second Death of Capital Punishment*, 58 FLA. L. REV. 639, 658 (2006).

132. See FRANCK, *supra* note 29, at 10; KOH, *supra* note 13, at 134.

133. See Broughton, *supra* note 131, at 658.

134. 536 U.S. 304 (2002).

135. 543 U.S. 551 (2005).

136. *Id.* at 563 (quoting *Atkins*, 536 U.S. at 312 (quoting, in turn, *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality op.))) (emphasis added).

gerrymandering cases. Although four justices have clearly articulated a sound basis for applying the political question doctrine to claims of political gerrymandering, a majority of the Court simply is not prepared to relinquish its power to supervise perceived political inequities in the drawing of legislative districts.<sup>137</sup>

Modesty, as Judge Posner notes, is not the order of the day in this Supreme Court.<sup>138</sup> The war on terror cases, and the *Hamdan* case in particular, also suggest that judicial modesty will not prevail in cases involving war-time political decisionmaking either.

The difficulty, however, goes beyond the mere unseemliness of the Court's arrogance. Aggressive judicial review of cases that implicate the allocation and exercise of federative power undermines not just the institutional role of the Court, but of our political institutions, as well. As I have previously argued, in this emerging regime, courts, rather than political institutions, become primary mediating institutions for filtering out and moderating public passions and factious spirit.<sup>139</sup> This kind of regime minimizes essential distance between governing institutions and the people. This distance, which the Constitution contemplates and makes real in its description of our institutions, provides the space that institutions need to fulfill their responsibilities (especially their most grave ones), space between the chaotic, often undisciplined cries of public opinion and the measured refinement of popular will through reason, rational deliberation, and sober judgment.<sup>140</sup> Leaders of the founding generation, like Hamilton, Madison, and Marshall, believed that courts should be cognizant of the demands of practical governance in a republic, allowing the political

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137. See *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2663 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) (citing the majority's refusal to dismiss the political gerrymandering claim as non-justiciable); *Vieth v. Jubelirer*, 541 U.S. 267, 267–68 (2004) (plurality opinion holding political gerrymandering to be non-justiciable).

138. Richard A. Posner, *The Supreme Court, 2004 Term, Foreword: A Political Court*, 119 HARV. L. REV. 31, 56 (2005).

139. See Broughton, *supra* note 131, at 660.

140. See HARVEY C. MANSFIELD, *AMERICA'S CONSTITUTIONAL SOUL* 16 (1991) (discussing the importance of constitutional "space"); see also BARRUS ET AL., *supra* note 3, at 15–17 (explaining Madison's vision for representation and practical governance based on reason).

departments to function free of an imprudent Judiciary.<sup>141</sup> Thus, the distance the Constitution provides for the executive is substantial (though modern practice has intolerably diminished it, too); the distance provided, indeed, mandated, for the Judiciary is even greater, and is necessary to preserve not just the independence of the courts, but their circumspection, as well. Montesquieu and Publius both remind us that political liberty requires that judicial power be separate from the political powers vested in the legislature and executive.<sup>142</sup> By the same token, a regime of omnipotent judicial review also makes practical governance and the object of controlling the governed even more burdensome.

Judicializing federative power diminishes the significance of the Constitution's commitment of competing foreign affairs powers to the political branches, the allocation of which Professor Yoo persuasively demonstrates in his recent scholarship.<sup>143</sup> As I have argued elsewhere, constitutional deliberation should be encouraged in the political branches, each of which possesses an independent obligation to determine the Constitution's meaning.<sup>144</sup> The political branches will be less likely to deliberate seriously about their respective constitutional roles when there exists the prospect of judicial relief and guidance from the courts. And particularly in circumstances where (as is usually the case) it is the President whose assertion of power is challenged, aggressive judicial review will also undermine the significance of the Constitution's provision for political self-help. Congress possesses three important checks on presidential overreaching: its power to fund foreign relations projects,<sup>145</sup> its power to legislate (which includes investigative and oversight powers),<sup>146</sup> and, often forgotten, its impeachment

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141. See Hamilton, *supra* note 22, at 54 (describing limits on the Judiciary in foreign relations and urging that each political branch be permitted room to fulfill its functions); see also David E. Marion, *The State of the Canon in Constitutional Law: Lessons from the Jurisprudence of John Marshall*, 9 WM. & MARY BILL RTS. J. 385, 416 (2001) (explaining how Madison and Marshall recognized the importance of practical governance and sought limits on judicial intrusion).

142. See MONTESQUIEU, *supra* note 6, at 157; THE FEDERALIST NO. 47 (James Madison), *supra* note 14, at 302–03.

143. See generally YOO, THE POWERS OF WAR AND PEACE, *supra* note 13.

144. See Broughton, *supra* note 28, at 719–24.

145. U.S. CONST. art I, § 8.

146. *Id.* art. I, § 1.

power.<sup>147</sup> It can employ those checks without a permission slip from the courts.

One response may be that cases like *Hamdan* do not actually undermine political institutions, but empower them, at least to the extent that the decisions often inure to Congress's benefit, *à la* the *Steel Seizure Case*. But this argument overlooks the constitutional damage done to the Presidency. Judicializing federative power, even when (in fact, particularly when) it rebukes executive exercise of that power on constitutional grounds, will make the executive more cautious and more ambivalent.<sup>148</sup> It will deprive the executive of the energy that Publius reminded us is vital to its effectiveness.<sup>149</sup>

Moreover, specific affirmative constitutional grants of power to the President are compromised, which are necessary for effectuating the President's federative powers: the Vesting Clause and the Commander-in-Chief Clause are principal casualties,<sup>150</sup> but one must not overlook the significance of the Oath Clause either.<sup>151</sup> The constitutional oath operates as an affirmative grant of power to the President to defend the Constitution. To be sure, other officers must also take an oath, but their oaths are not constitutionally prescribed and the Constitution says only that they must "support this Constitution."<sup>152</sup> As a textual and structural matter, then, there is something significant about the fact that the President's oath is

147. *Id.* art I, § 3.

148. See generally MANSFIELD, *supra* note 4.

149. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 14, at 423.

150. U.S. CONST. art. II, §§ 1, 2; see also *Exercising Congress's Constitutional Power to End a War: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Bradford Berenson, former Associate Counsel to the President) (stating that the "Vesting Clause provides the President a vast reserve of implied authority to do whatever may be necessary in executing the laws and governing the nation"); YOO, THE POWERS OF WAR AND PEACE, *supra* note 13, at 183–84, 272 (pointing to areas of foreign affairs that are predominantly "executive" in nature and are supported by the Vesting Clause); Prakash & Ramsey, *supra* note 13, at 324–27 (arguing that the Vesting Clause allows the President to act independently in foreign affairs where his actions are "executive" in nature); Eugene V. Rostow, "Once More Unto the Breach": *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 14–15 (1986) (arguing that the Vesting Clause gives the President wide latitude in exercising war powers); but see Bradley & Flaherty, *supra* note 13, at 53–59 (challenging the Vesting Clause thesis as a basis for broad executive powers in foreign affairs).

151. U.S. CONST. art. II, §1, cl. 8; see also Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1258–59 (2004) (arguing that the Oath Clause allows the President to meet necessity to protect the Union); cf. Robert F. Blomquist, *The Presidential Oath, the American National Interest, and a Call for Presiprudence*, 73 UMKC L. REV. 1, 37–50 (2004) (summarizing the scant literature related to the presidential oath).

152. U.S. CONST. art. VI, § 1, cl. 3

placed *in* the Constitution and that it requires him to “preserve, protect, and defend” the Constitution, rather than merely “support” it.<sup>153</sup> The oath provides a mechanism and a source of legitimacy for the exertion of the President’s energy to safeguard the Republic, energy that is more than defensive in nature and that, in the end, ought to promote civic virtue and decency.<sup>154</sup>

In a regime where a unitary executive’s effort to preserve, protect, and defend the Constitution is subject to intense scrutiny by the courts, the President must constantly look over his shoulder for five disapproving Supreme Court justices (the prospect of which may be more daunting than 535 disapproving members of the House and Senate). Of course, this is true with any presidential action; but, again, the Constitution divides federative power between the political branches (note, it *divides* independent powers; each power is not “shared,” but rests solely in the branch to which it is given, to resist encroachment) in ways that it does not divide other categories of power—the distribution of federative power to multiple branches is unique in our constitutional scheme—which reflects the constitutional and political distinction between domestic action and foreign affairs, where the consequences of lacking energy are more dire. The very characteristics that define the energetic executive are of special import in the domain of foreign affairs, where the President must be able to act with dispatch and secrecy.<sup>155</sup> A

153. *Id.* art. II, § 1.

154. See THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 14, at 402 (noting that energy was essential not just to defend against attack but also for the “steady administration of the laws,” the protection of property and of liberty); see also Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 66–70 (1993) (discussing the role of the oath as expressing the President’s “protective” power).

Michael Stokes Paulsen makes a compelling case for the scope of President’s duties under the Oath Clause, which includes dominant duties of constitutional interpretation. Paulsen, *supra* note 151, at 1258–60. Moreover, although he does not explicitly advocate judicial abstention or application of the political question doctrine to matters involving war and foreign affairs, Professor Paulsen argues that the President’s duty under the Oath Clause suggests that “the President cannot be bound by the decisions of courts, in the sense that he must defer, no matter what.” *Id.* at 1296. Should the President determine that necessity requires his action, then “his duty as President—his duty to the Constitution—requires that he not let a judicial decision to the contrary prevent him from performing what his duty requires.” *Id.* Pursuant to this view (which is a persuasive one), the Oath could serve to counteract judicialization of the federative power, to the extent that it permits a President to reject compliance with a judicial decision contrary to his own interpretation of his constitutional responsibilities. One wonders, however, whether political and other practical considerations (e.g., intense scrutiny and criticism from the mass media) would ever permit a modern President to do this.

155. See THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 14, at 403.

judicialized federative power like the one that *Hamdan* portends, however, has the potential to relegate the Commander-in-Chief to service at the pleasure of the courts. Unity and energy are thereafter marginalized to the point of meaninglessness. Judicial finger-wagging at the President (of the kind we see in *Hamdi* and *Hamdan*) may seem appealing, even useful, at a time when the President and his foreign policy are unpopular, but it can do lasting damage to the institution and, thus, to the Republic.

It is in the Executive that the Constitution best balances stability and adaptability and best reflects the Lockean vision of federative power. Professor Mansfield correctly explains that our system constitutionalizes necessity in the manner of Locke.<sup>156</sup> Accident and force cannot be removed from human affairs.<sup>157</sup> The Constitution's genius lies, in part, in its capacity to constitute an institution that may (must) grapple with necessity, while still retaining the republican form. Both Publius and Pacificus remind us that energy is not a recipe for prerogative;<sup>158</sup> rather, it is a kind of Aristotelian mean between weakness and unrestrained prerogative. Nor is energy in the executive incompatible with safe government.<sup>159</sup> In this sense, at least, we can see once again how the Constitution's prescription for federative power is more Lockean than its surface allocations would suggest.

Another response may be that an absence of judicial oversight will weaken Congress so much so as to make its federative powers meaningless, or, as Justice O'Connor seemed concerned in *Hamdi*, judicial deference would effectively place federative powers solely within a single branch—but why must this be so?

This argument assumes that Congress needs the prospect of judicial relief to defend its own constitutional powers. But as I have explained already, those powers exist independently of any judicial bolstering; lacking the political will or fortitude to employ them is not the same as not having them in the first place.<sup>160</sup> This argument also assumes, again wrongly, I think, that

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156. MANSFIELD, *supra* note 4, at 255.

157. *Id.*

158. *See, e.g.*, THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 14, at 399–401 (distinguishing the President from the King, who enjoyed the prerogative, and noting specifically that use of the veto would not amount to general prerogative); Hamilton, *supra* note 22, at 57 (conceding that Congress may employ its own powers).

159. *See* THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 14, at 402–08.

160. *See* YOO, THE POWERS OF WAR AND PEACE, *supra* note 13, at 159.

federative power is a kind of zero-sum game, where we must choose between a weak Congress and a strong Executive, or a weak Executive and a strong Congress. By implementing a design where the political branches are empowered to struggle with one another and deliberate seriously about the exercise of American military and diplomatic authority, the Constitution contemplates that we can have a strong Congress *and* a strong Executive in foreign affairs. It contemplates that ambition will be made to counteract ambition.<sup>161</sup> If the Framers had meant to adopt a purely and formally Lockean version of federative power, they would not have given Congress the constitutional tools to safeguard its own prerogatives in war and foreign policy. The War Powers Resolution is the modern Congress's most dominant assertion of its prerogatives. Moreover, it is particularly notable that the 110th Congress has taken action to undermine further the notion that the Republic's dominant branch needs the support of the courts to protect its constitutional prerogatives in the area of federative power. Multiple bills and non-binding resolutions have been introduced to limit President Bush's efforts to send more military troops to Iraq in an effort to stem the tide of violence there and better enable Iraqi forces to secure their communities.<sup>162</sup> The Senate Committee on the Judiciary also held a hearing to explore the nature and scope of its war powers.<sup>163</sup> Whether these actions eventually result in binding legal authority, produce an actual conflict with the Executive, or are even politically or constitutionally desirable, is another matter entirely. They reflect at the very least an institutional interest in (indeed, a capacity for) asserting legislative prerogatives in the war powers

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161. THE FEDERALIST NO. 51 (James Madison), *supra* note 14, at 319.

162. *See, e.g.*, S. 433, 110th Cong. (2007) (sponsored by Sen. Obama, expressing United States policy for Iraq); S. Con. Res. 2, 110th Cong. (2007) (sponsored by Sen. Biden, expressing a bipartisan resolution in Iraq); S. 121, 110th Cong. (2007) (sponsored by Sen. Feingold, providing for redeployment of United States forces from Iraq); *Exercising Congress's Constitutional Power to End a War: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007); *see also* S. Res. 39, 110th Cong. (2007) (sponsored by Sen. Byrd, expressing sense of the Senate that Congress approve any offensive military action by United States against any other nation).

163. *See Exercising Congress's Constitutional Power to End a War: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007); *see also id.* (statement of Sen. Feingold) ("The President has chosen to ignore [the message of voters in November 2006]. So it is up to Congress to act."); *id.* (statement of Louis Fisher) (discussing various constitutional and political tools that Congress possesses and concluding that "[i]n a democratic republic, [the decision to commit military forces] legitimately and constitutionally resides in Congress.").

arena, further ratifying the wisdom that the Constitution contemplates conflict and competition between the political branches free from a judicialized federative power.

Consequently, judicialization does damage to both the Lockean and un-Lockean forms of the constitutional structure.

#### IV. CONCLUSION

Those who argue that the second President Bush has asserted an unprecedented view of executive authority overlook much history and its lessons. Our political and constitutional history is littered, both in theory and in practice, with competing arguments about the scope of presidential powers. And some of our most beloved Presidents were ones who took particularly robust views of their Article II authority, despite the unpopularity of their actions or claims that they had acted without precedent. This is not to justify any particular foreign policy decision by the current President or any other President. It is, rather, to suggest that President Bush's view of presidential power would not have been unfamiliar to other Presidents who faced national emergencies and grave threats in the international system—those “tides” in the “affairs of men” of which Jay speaks in *The Federalist No. 64*.<sup>164</sup> That a politically friendly Congress has, as some feel, failed to assert its own prerogatives is hardly the fault of the President, and, to be sure, the President's assertion of his own prerogatives does not become “extraordinary” or “unprecedented” merely because the counterexample is a Congress that either agrees with the President or, as in some historical instances, is still in search of a spine donor.

But in order to meaningfully employ a scheme in which congressional and executive federative powers are simultaneously robust but not encroaching, we must, rather than seek solace from the courts, take seriously the formal institutional arrangements that the Constitution provides. The forms of the Constitution help secure a competent and safe government. When we value the convenience of judicial bypass above form, it often becomes easier for one branch to encroach, or to at least justify the encroachment, upon something about which the Framers were primarily concerned. Distance was, for

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164. THE FEDERALIST NO. 64 (John Jay), *supra* note 14, at 377.

them, a structural virtue. Over time, the offended branch becomes too weak to defend its constitutional prerogatives. When we rely upon the forms of the Constitution, however, we see a scheme for the robust exercise of constitutional prerogatives by the political branches that also resists, or at least checks, encroachments. That scheme is particularly dynamic in the field of federative power. Judicializing federative power, however, undermines the formal constitutional design and, ultimately, marginalizes political authority to address and respond to the harsh realities and necessities that accompany the conduct of actors in the international arena. Circumscribing judicial review of the political branches, and particularly a Lockean executive, may seem dangerous. It is, but so is an omnipotent Judiciary—perhaps more so.